Supreme Court, U.S.
FILED
JAN 10 2007
OFFICE OF THE CLERK

No. 06-122

IN THE

Supreme Court of the United States

MIKE H. SAMADI,

Petitioner,

v.

MBNA AMERICA, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REHEARING

MIKE H. SAMADI,
Pro Se Petitioner
4555 Bettys Branch Way
Evans, GA 30809
(706) 364-0555

QUESTION PRESENTED

Whether the arbitration clause asserted by respondent MBNA is conscionable to the extend that when it claimed (without proof) sent out through a third party mailer however, recipient (Samadi) did not receive such agreement, even when the initial agreement did not contain any statement regarding arbitration.

STATEMENT OF JURISDICTION

The Judgment of the Court of Appeal was entered into on April 21, 2006. The Petition for writ of certiorari was filed on July 20, 2006 which is within the 90 days required and according to the case analysts of the Clerk of this Court; therefore, jurisdiction exists in this Court.

INTRODUCTION

There is a strong compelling reason to grant the petition for writ of certiorari. The fact that MBNA claims the initial agreement (1996) stated that an amended agreement maybe sent out at sometime in the future is not sufficient when the non-existence of such agreement is an issue. In MBNA's initial agreement that Samadi admitted he received, there was no mention of an arbitration clause. MBNA claimed that an amended agreement was mailed through a third party several years (2000) after the initial agreement. However, no proof was provided. Even if this Court resolves the "benefit of the doubt" in favor of MBNA, there is still other issues at stake such as receivership of such amended agreement (the only document that stated the arbitration clause); as well as, the fact that the arbitrator does not have authority to grant punitive, exemplary and other damages as claimed in Samadi's complaint.

STATEMENT REGADING THIS REHEARING

In *Larry dean Dusenbery, Petitioner v. United Stats*, 534 U.S. 161 (2002) 223 F.3d 422, affirmed, U.S. No. 00—6567 [January 8, 2002], this Court stated,

" 'The fundamental requisite of due process of law is the opportunity to be heard.' *Grannis* v. *Ordean*, 234 U.S. 385, 394 [1914]. This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

Therefore, Petitioner Samadi is confused as to his request for an oral argument before the United States Court of Appeal for the 11th Circuit and this Honorable Court.

Moreover, the Court's denial of Samadi's petition for writ of certiorari does not specify the grounds in which the petition was denied, leaving confusion as how to present his argument in this re-hearing. Samadi is not certain that 1) if the petition is denied in its entirety due to the prerequisite of the writ, 2) the initial agreement with MBNA (only agreement received, acknowledged and admitted by Samadi) enforced a binding arbitration agreement (even though that agreement had no arbitration clause), 3) that Samadi's claim as non-receipt of such agreement for arbitration is invalidated or 4) Samadi's arguments regarding unenforceable arbitration being conscionable is invalid.

In absence of any indication, Samadi feels that any arguments made herein would be "shooting in the dark". Since the issue in which the District Court and the U.S. Court of Appeals for the 11th Circuit agreed with MBNA's claim that it sent out the arbitration agreement; therefore, Samadi will concentrate on the receipt of the amended agreement issues alone. However, Samadi begs the Court of any indication of the issue(s) that caused the denial of the writ of certiorari.

STATEMENT OF THE CASE

MBNA arbitration claims can be argued in two parts. They are as follow:

A. MBNA's claim of mailing the second agreement which contained that arbitration clause and Samadi's non-receipt.

MBNA claimed that two agreements were sent to Samadi, the initial agreement that bound both parties to the terms of the initial agreement. Based upon MBNA's statement, this agreement was sent in 1996, Samadi never denied receiving this agreement. This agreement stated; any disputes must be resolved in the Delaware Courts and that MBNA may amend the terms of this agreement. This agreement does not make any reference to arbitration or any terms thereof. Because of diversity of citizenship, Samadi filed his complaint in the District Court in Georgia.

MBNA further claimed that Samadi received the second agreement in 2000. Samadi disagreed since he's never seen nor heard of this second agreement until motion to compel arbitration was filed. Without any proof or evidence, the Courts below accepted MBNA's statement apparently because its Vice President (who has much interest like Samadi at stake from the out-come of this case) made a "**hearsay**" affidavit stating that an amended agreement was mailed through a third party who contracted out with a forth party to mail the same. However, no verification from any parties was provided as evidence. The author of the affidavit was not involved in any part of preparing or forwarding the amended agreement to Samadi. Moreover, Samadi was not able to nor given the opportunity to cross-examine the witness or her affidavit.

Also, MBNA continually made reference to its Affidavit as the "key factor" in that Samadi must have received the second/amended agreement meanwhile shrugging off Samadi's affidavit. Before this Court, MBNA's Brief in Opposition page 6-7 MBNA refers to the V. P.'s affidavit as a matter of law while stating, "*he offered only his own affidavit in which he merely claimed that he did not receive of the*

amendment from MBNA." MBNA's statement is misleading for two reasons. 1) MBNA itself, only offered its own employee's "hearsay" affidavit; however, Samadi's affidavit was not hearsay. 2) Samadi's affidavit clearly stated, he did not receive the amended agreement and holds no suggestive element of "*merely*".

When MBNA filed its motion to compel arbitration, Samadi was not aware such a motion was filed. During the Sunday conversation when MBNA's counsel informed Samadi, the counsel admitted that it is not unlikely for mail not to be delivered. Furthermore, even during the initial steps of the proceeding before the District Court (when motion to compel arbitration was not an issue), there was at least one occasion when each party did not receive the other party's proceedings. These are evidences within this claim which were argued that it is possible for the mail delivery among all other things not to be perfect.

In this era and within the system of justice that sets the standards and persistent (even with other countries) where the burden of proof is one of the "key factors" of this great justice, Samadi is amazed that the Courts have shifted the burden of proof of none-receivership to him, instead of MBNA.

Even if there were a mere possibility that Samadi could have proven his none-receivership of the said second agreement, the District Court has already made its decision based upon the Report and Recommendation of the Magistrate Court. There were not much time for Samadi to investigate and reply as he was also facing his father's cancer and mother's illness. Therefore, the appeal was in progress and that no further document (if Samadi could have researched and found the cause) could have been presented. Briefly understanding the legal procedures of appealing a decision, Samadi's hope to submit any document in support of his arguments was lost. As a result, Samadi requested an oral argument which the Court of Appeals for the 11th Circuit overlooked.

Moreover, the Courts disregarded the fact that while filing his initial complaint with the District Court in August 2004, Samadi

presented Exhibits and frequently referred to these exhibits (so did MBNA) as **evidences that this was not the first time MBNA's mail had not reached Samadi and that Samadi repeatedly requested copies of monthly statements be resent (in 1996 through 2002).** Samadi provided these evidences well in advance of MBNA's answer to the original complaint. If nothing else, the exhibits are proof that mail had been lost between parties. The difference between monthly statements which are repeat mailings versa a one time 'unverified' or 'unacknowledged' mail is very clear. When a statement is missing, a person becomes alarmed by the fact that the sequence is broken. However, with a mail which its verification is never requested nor a follow up of any sort is done, one would need to posses a "magical power" in order to be aware of the mail's existence.

Additionally, Samadi argued that the United States Postal Service (hereinafter 'USPS) does not deliver all letters to their designated recipients. In fact, since this petition was filed, Samadi has received several mails that were addressed to other individuals (not even on his street) at his mailbox. It is clear that the USPS does not always deliver the mail to its correct recipient. Only if the Courts below allowed providing such proof, possibly the Courts would recognize that Samadi did not receive the amended agreement MBNA claims.

An example of undelivered mail is incorporated herein and referenced hereto Exhibit A, when a Certified Mail with additional postage paid (to insure its delivery or return back to the sender) was sent to the Dead Letter Center (now called "MRC") Atlanta office of USPS for destruction. The letter was sent out using additional postage so that the recipient would sign and acknowledge its receipt. However, recipient did not claim the letter. Instead of returning the letter to the sender, the USPS sent it to the Dead Letter section and shortly thereafter destroyed the letter. The sender's and receiver's addresses were clearly TYPED on the envelop as well as on the Certified Return Receipt ('Green Card'). There should not have been any reason for the letter not be returned to sender; however, the USPS did not deliver (inconsistent with 39 U.S.C. § 404 or any other code section which prescribes the delivery of mail or "undeliverable mail").

The USPS claims that it has better equipment and policies in place in recent years. As a result, there should have been no reason for this letter to be destroyed. The receipt of this letter by one party or another was "**Guaranteed**". Furthermore, the USPS states, "*we have two large Dead Letter Centers ('Mail Recovery Center') in the United States (Atlanta, GA and St. Paul, MN) to destroy letters*". Moreover, the USPS cannot and does not have a system in place to track or create statistics on how much first class mail is destroyed per any time frame. Therefore, there is no indication of how many millions of letters per year are destroyed for one reason of another. Yet, the Courts below wish Samadi (the recipient) to provide proof of non-receipt of a non-guaranteed and non-traceable first class mail.

Now, ignoring the fact there are many ways for letters to get lost, the USPS has no system is in place to provide any evidence to the Courts for the purpose of this litigation. Yet, the Courts discarded the factors; agreed that because MBNA made a hearsay statement "*a letter was sent through a forth party contracted by a third party contracted by MBNA*" (even though neither of those parties provided proof); therefore, according to the courts, Samadi must have received the second agreement.

In its "Brief in Opposition" in the Court, MBNA continually claimed that Samadi "admitted he received the agreement". MBNA failed to disclose to the Court that Samadi constantly admitted to all Courts he received the **first/initial** agreement and did not receive the second agreement (that indicated the arbitration clause). MBNA repeatedly misrepresented the facts and the Courts agreed with MBNA even though Samadi presented arguments otherwise.

B. Even if the Arbitration clause existed it is still unenforceable.

In the initial complaint, Samadi requested for damages (R1-1 P.7, P. 20 ¶¶ 64, ¶¶ 66, P. 21¶¶ 66(G), P. 21 ¶¶ 66 (G)(iv)(e) & (f), P. 23 (C)). Part of the damages are punitive, contractual, exemplary and statutory damages. The arbitrators have no authority to award any punitive, exemplary damages or extra contractual damages of any

kind. Samadi's complaints in the District Court were clear and detailed. First, Samadi's compliant not only specified the contractual breach but also violations of the law. Whether applying to Delaware or Georgia laws, the violations of FCRA, CCPA and TILA are federal. These violations and damages are due to the destruction of his credit, violations and breach which are not arbiter-able.

Furthermore, Samadi is not clear on this Honorable Court's decisions concerning extreme arbitration cost for plaintiffs; although the Court remanded cases that raised such issues. However, Samadi is not capable of bearing such arbitration cost.

SUMMARY

None of the Courts considered the mere possibilities of the "benefit of doubt", nor the Courts noted about "burden of proof". It seems, the Courts had already made a conclusion. However, if a consumer claims a payment was sent and a business claims that it did not receive the payment, then the consumer must provide prove.

In the system of justice that factors of doubts need to be resolved before a judgment is made, it is difficult to understand the fact that a burden of prove is shifted to a party that did not receive such mail. There is no possibility of providing any proof, especially since the carrier of such mail (the USPS) has no accountability for delivery (even in cases of guaranteed delivery).

It is a grave miscarriage of justice to hold such a prerequisite from Samadi who has a meaningful claim that can only be resolved through the Courts. Besides the fact that the Court held that the arbitrator cannot grant damages. Plus, arbitration is unaffordable.

CONCLUSION

MBNA has not established any compelling reason for this Court to grant its objection and allow the Arbitration to be enforced. Accordingly, Samadi respectfully requests that the Order of the United States Court of Appeals for the 11th Circuit and the District Court for Southern District of Georgia be reversed and the matter be remanded for consideration of the facts stated herein.

Respectfully Submitted,

Mike H. Samadi,
Pro Se Petitioner

4555 Bettys Branch way
Evans, Georgia 30809
(706) 364-0555

EXHIBIT A
Page 1

November 13, 2005

CERTIFIED MAIL 7004 2510 0005 0513 5857
RETURN RECEIPT REQUESTED

Mr. Kelton Ivey
2503 Perot Court
Hephzibah, Georgia 30815

Dear Kelton:

I am forced to forward you this letter as a result of my conversation with you and your aunt. This is my formal request that you MUST immediately pay the amount of Three Thousand Nine Hundred and Fifty Dollars ($3,950.00) that you owe, plus interest. If you decide not to pay, I will be forced to pursue legal actions which will create a negative effect on your credit file. You will also be responsible for all costs I incur such as attorneys fees, cost of litigation and any other expenses to include cost of delivery of this letter.

For the past few months that we have been communicating (ever since the closing of property at 2503 Perot Court), you repeatedly promised you would pay the amount you owe me. You even stated you are doing better financially as you are receiving extra time at work. I patiently waited for you to make good on your promises and your written guarantee to me. However, I can no longer wait, since I did not charge you interest for this loan during the past six months.

12/2/05 Heph. 592-2570 Stole w/ Kelton
30904 → 738-9822 Jean Hardin
823-3122 left detail msg

EVANS POSTAL STORE
EVANS, Georgia
30809998
1254920613-0095
11/14/2005 (800)275-8777 04:11:23 PM

Sales Receipt

Product Description	Sale Qty	Unit Price	Final Price
HEPHZIBAH GA 30815			$0.37
First-Class			
Return Receipt (Green Card)			$1.75
Certified			$2.30
Label Serial #: 70042510000505135857			
Issue PVI:			$4.42
Total:			$4.42
Paid by:			
Cash			$10.00
Change Due:			-$5.58

Bill#: 1000503099177
Clerk: 06

All sales final on stamps and postage.
Refunds for guaranteed services only.
Thank you for your business.
Customer Copy

U.S. Postal Service
CERTIFIED MAIL™ RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)
For delivery information visit our website at www.usps.com

7004 2510 0005 0513 5857

Postage	$
Certified Fee	
Return Receipt Fee (Endorsement Required)	
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees	$

Sent To: Kelton Ivey
Street, Apt. No.; or PO Box No.: 2503 Perot Crt.
City, State, ZIP+4: Heph. GA 30815

PS Form 3800, June 2002 — See Reverse for Instructions

EVANS GA 30809 NOV 14 2005

hav ease feel free to contact me at (706) 364-0555.

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Mil

555 Bettys Bran
vans, GA 3080

(706) 364-0555
Fax (706) 364-0558

EXHIBIT A
Page 2

UNITED STATES POSTAL SERVICE

Track/Confirm - Intranet Item Inquiry - Domestic

Item: 7004 2510 0005 0513 5857

Destination	**ZIP Code:** 30378	**City:** ATLANTA	**State:** GA
Origin	**ZIP Code:**	**City:**	**State:**

Event	Date/Time	Location	Scanner ID
DEAD LETTER	02/10/2006 10:38	ATLANTA, GA 30378	K960206

Enter Request Type and Item Number:

Quick Search ◉ **Extensive Search** ○

Version 1.0

Inquire on multiple items

Go to the Product Tracking System Home Page.

EXHIBIT A
Page 3

Track/Confirm - Intranet Item Inquiry
Item Number: 7004 2510 0005 0513 5857

The item(s) you queried are summarized below. If you would like to request a delivery record check the box in the "Select" column to the right of the item (if available). Learn more about Restore.

Detail	Item	Origin	Destination	Firm	Recipient	Event/Image Info	Date
[redacted]	70042510000505135857		30378			DEAD LETTER	02/10/20
Archived	70042510000505135857		30815			First System Date	11/14/20

[redacted]

Enter Request Type and Item Number:

Quick Search ◉ **Extensive Search** ○

[redacted]

[redacted]

[redacted]

Version 1.0

Inquire on multiple items.

Go to the Product Tracking System Home Page.

EXHIBIT A
Page 4

ATTN° MIKE
706-364-0556
FROM° DOUG SHIRER

3 pgs incl cover
4/11/06

1/8/16 Atlanta NRC, P.O Box (Don't need address)

P.O offs 30909 { 706-737-5156 → Melvin Tweedy manager of wrightsboro branch
30904 { 706-823-3131 → James Lloyd, Sup. of P.O. Dawson

need call Ms. Carrol Klein elect stat. 706-823-3146

303 Atlanta Main office → Fraud Center 404-523-5057 → 404-765-7637 (Main PO)
CNN center 404-524-3379

@2:15PM called 404-765-7637 (can't take calls on this) Helmet, Kevin, Pat Caingerich 404-765-7640
Crawford @ the Dead Center called Back Says P.O doesn't have a way to do shit. I told her
that we with the Courts. She said, "How can you prove you didn't receive the letter?"
I said there should a written statement that you could be able to make level I sanctions as far as
so many letters are destroyed per cycle." She said: "I don't know, we have mail of know of, please
Supreme court itself should know the laws and regulations which P.O is bound by especially for "unlawful"
this part of statute..." So help me received 404-344-1625
I "believe 2 large Dead Letter Centers in US (Atlanta, 5th prob)."